

**NOT YET SCHEDULED FOR ORAL ARGUMENT  
Nos. 18-1082, 18-1117**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**PLANNED BUILDING SERVICES, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ**

**Intervenor**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**SUPPLEMENTAL APPENDIX**

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*Planned Building Services, Inc.*

February 28, 2000

Updated March 1, 2000

Mr. Paul Wasserman, Vice President  
AM Property Holding Corp.  
352 Seventh Avenue, 11<sup>th</sup> floor  
New York, New York 10001

Re: 75 Maiden Lane  
New York, New York

Dear Mr. Wasserman:

Pursuant to the conversation the undersigned had with you regarding the services to be performed at the captioned premises, and after an inspection of the subject premises, we are pleased to submit our Building Services Proposal for the services to be performed at said property, as follows:

**AREAS TO BE SERVICED**

We will maintain the common areas and the tenant space outlined by your management, within the captioned complex comprised of approximately 130,000 square feet, throughout the thirteen (13) floors, as well as all public areas, lobby, three (3) elevators, entranceways, foyers, hallways, corridors, stairwells and restrooms located throughout said building.

**FREQUENCY OF SERVICE**

The daily cleaning services outlined shall be rendered five (5) days per week, exclusive of any and all holidays honored by your complex.

**STAFFING**

In order to perform the services, as well as any other chores and functions directed by your management, we intend to provide the following staffing, as follows:

1. One (1) Full-time Lead Porter/Watchmen (4:00 p.m. - 12:00 p.m.)
2. One (1) Full-time Porter/Watchmen (12:00 a.m. - 8:00 a.m.)
3. Two (2) Part-time Porters (6:00 p.m. - 10:00 p.m., or as designated)
4. Two (2) Full-time Day Porters (separate price included)

13th floor  
per  
hr

*Planned Building Services, Inc.***DAILY SERVICES**

**We will empty all trash receptacles.**

**We will sweep and dust mop all uncarpeted floors.**

**We will dust mop 4 times a week and mop once a week.**

**We will sweep all rugs and carpeted areas four times per week and vacuum once per week.**

**We will hand dust paneling and windowsills.**

**We will wash clean all water fountains and water coolers.**

**All lights shall be extinguished and windows closed and all doors shall be locked after cleaning is completed.**

**We will dust all air vents once a week.**

**REST ROOMS - DAILY**

**We will mop and rinse floors, polish mirrors, clean enamel surfaces, wash basins, urinals and bowls.**

**We will wash both sides of toilet seats.**

**We will damp wipe with disinfectant tile walls and flooring.**

**We will polish flushometers, piling, faucets and all metal works.**

**We will fill and maintain all toilet tissue and towel dispensers.**

**We will fill soap dispensers.**

**We will empty all waste paper receptacles.**

**We will wash down all stalls from trim to floor once every 30 days.**

**HIGH DUSTING – QUARTERLY**

**We will dust all pictures, frames, charts, graphs and similar wall hangings not reached in nightly cleaning.**

**We will dust all light fixtures and enclosures.**

*Planned Building Services, Inc.***SUPERVISION**

The planning, organization, control and coordination of the daily and periodic cleaning requirements and maintenance services shall be determined and scheduled by our Site Manager in conjunction with the directions, requests and suggestions of your management and maintained in accordance with the quality control of our Regional Supervisor.

**REMUNERATION**

We will perform the above-mentioned services for the currently occupied tenanted areas, comprised of square feet, for the sum of SEVEN THOUSAND SIX HUNDRED AND 00/100 (\$7,600.00) DOLLARS<sup>1 2</sup>, plus applicable sales tax, if any, per month for a period of four (4) years. Thereafter, any changes are subject to a thirty (30) day prior written notice by either party, or same shall renew itself in like terms.

We will perform the daily, full-time porter/concierge services for the sum of FOUR THOUSAND TWO HUNDRED AND 00/100 (\$4,200.00) DOLLARS<sup>1 2</sup>, plus applicable sales, tax, if any, per month for a period of four (4) years. Thereafter, any changes are subject to a thirty (30) day prior written notice by either party, or same shall renew itself in like terms.

The aforementioned monthly sum shall be invoiced monthly on the first day of each month and shall be due and payable within ten (10) days thereafter. Payments not received within said ten (10) days of rendering of said invoice shall have a late charge of four (4%) percent of the past due amount added thereto per month.

The aforementioned monthly charge shall remain firm for the first year of this agreement, and thereafter shall be subject to the provision that said price may increase or decrease to reflect adjustments in the direct out-of-pocket costs of PBS for the performance of the services provided herein as a result of changes in wage and/or fringe benefit costs pursuant to applicable collective bargaining agreements; provided,

<sup>1</sup> If, as and when, additional labor is requested by your management, you shall be invoiced at \$15.50 per hour regular time and \$21.75 overtime, increased annually by contract labor increase. Special projects will be addressed with agreed upon pricing and a signed purchase order from your management.

<sup>2</sup> Any employee that is retained from your existing staff at your request who is receiving wages and/or benefits in excess of those contained within the wage rate structure and benefits within union collective agreement, shall continue to receive said rates differential and/or other benefits. In that event, PBS shall invoice Owner only for the actual differential plus a twenty-five (25%) percent direct labor overhead factor plus the actual costs of any additional benefits which are to be provided. There shall be no charge whatsoever for administration or profit attributable to these individuals.

As per your request, the daily porter/concierge service rate incorporates the retention of one (1) day porter @ \$8.75/hr., with single health coverage, holidays and sick days.

*Planned Building Services, Inc.*

however, that such increase shall be limited to a maximum of five (5%) percent for each year of this contract.

The aforementioned monthly charge does not incorporate either window cleaning or pest control, which we can have performed by specialists and invoiced directly to you.

If, as or when, 15,000 square feet is added to the current occupied space, we shall provide one (1) additional part-time porter at the rate of \$1,111.00 per month, plus applicable sales tax, if any, to be reviewed after one (1) year.

**RESTRICTIVE COVENANT**

Provided that not prohibited by existing law or public policy, the customer and its affiliates or subsidiaries in the State of New York agree to refrain from directly or indirectly soliciting our employees to work for them in a similar job classification for six (6) months after they voluntarily or involuntarily leave our employment at your premises.

Should this covenant be violated by your organization, you shall pay Planned Building Services, Inc., three (3) months' average earnings per employee as compensatory damages for the loss of a trained employee. All costs, including attorney's fees and court costs, in collecting this payment, shall be borne by your organization.

**MISCELLANEOUS**

We agree to furnish all labor and uniforms, as hereinabove provided in the fulfillment of this agreement, as well as any equipment<sup>3</sup> and cleaning supplies, exclusive of paper goods, toilet articles and plastic liners. Any other items required by your management, including but not limited to walk off mats for inclement weather, shall be invoiced to you at our actual cost for same and subject to prior authorization of your management.

All employees hired to perform services at your complex shall be subject to the initial approval of your management.

We will pay all State and Federal taxes that are levied against payroll, as well as any other benefits prescribed by law.

<sup>3</sup> The equipment reviewed and inspected on-site will be retained for this specific contract. An attachment has been submitted with this proposal listing the items inspected on-site. All other supplies and equipment will be furnished by our organization.

*Planned Building Services, Inc.*

All our personnel are covered by Workers' Compensation and Public Liability Insurance in the amount of \$1,000,000/\$1,000,000 as well as a \$5,000,000 umbrella policy.

All our personnel are bonded. We are also covered by Property Damage and Finished Operations Insurance, thereby relieving you of all risk.

All personnel will be properly screened and always under competent supervision.

Respectfully yours,

PLANNED BUILDING SERVICES, INC.

*Robert A. Francis*

Robert A. Francis  
Vice President

ACCEPTED:

BY: 

DATE: \_\_\_\_\_

COMMENCEMENT DATE: \_\_\_\_\_

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION TWO

AM PROPERTY HOLDING CORP.  
MAIDEN 80/90 NY LLC, AND MEDIA  
TECHNOLOGY CENTERS LLC,  
a single employer, a joint employer with  
PLANNED BUILDING SERVICES, INC.

-and-

LOCAL 32B-32J, SERVICE EMPLOYEES  
INTERNATIONAL UNION AFL-CIO.

-and-

UNITED WORKERS OF AMERICA  
(Party In Interest)

AM PROPERTY HOLDING CORP.  
MAIDEN 80/90 NY LLC, AND MEDIA  
TECHNOLOGY CENTERS LLC,  
a single employer, a joint employer with  
SERVCO INDUSTRIES, INC.

-and-

LOCAL 32B-32J, SERVICE EMPLOYEES  
INTERNATIONAL UNION, AFL-CIO

Case Nos. 2-CA-33146-1  
2-CA-33308-1  
2-CA-33558-1

Case Nos. 2-CA-33864  
2-CA-34018

POST HEARING BRIEF OF PLANNED BUILDING SERVICES, INC.  
TO THE ADMINISTRATIVE LAW JUDGE

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#### IV. PBS DID NOT VIOLATE §8(A)(5) OF THE ACT

##### A. PBS WAS NOT A SUCCESSOR

The Complaint alleges that but for AM Property manager Cunningham's statement that the former employees would not be hired at 80 Maiden, PBS and AM Property would have hired a majority and together they would have been a successor to Clean-Rite. (Compl. ¶9(a)-(c)).

The General Counsel's allegation must fail because a majority of the Clean-Rite workforce was not interested in employment with PBS. Therefore, even assuming *arguendo* that Cunningham made the alleged comment (a fact PBS refutes), PBS and AM Property could not have become a successor to Clean-Rite. As discussed previously, this allegation also fails as a matter of law because there is no theory of "joint successorship" in Board law. Accordingly, since PBS is not itself accused of having engaged in individual acts that precluded a majority of the former employees from being hired, PBS cannot be a successor to Clean-Rite. Further, in the absence of a joint successor theory and allegations that PBS itself succeeded Clean-Rite, PBS could only have succeeded AM Property. However, because AM Property never hired the former employees, PBS in turn can not be liable for not hiring them.

Under the Burns successorship doctrine, an employer that takes over the operations of a predecessor employer must recognize and bargain with the union representing the predecessor's employees only when a majority of the new employer's employees, in an appropriate unit, consist of the predecessor's employees. NLRB v. Burns Security Services, 406 U.S. 272 (1972). As the United States Supreme Court noted in Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 n.6 (1973), "because the purchaser is not obligated by the Act to hire any of the predecessor's employees, the purchaser, if it does not hire any or a majority of those employees, will not be bound by ... any order tied to the continuance of the bargaining agent in the unit involved." Thus,

provided that PBS lawfully failed to hire a majority of the former Clean-Rite employees, it is not a successor, and it had no obligation to recognize and bargain with Local 32BJ. Bellingham Frozen Foods, Inc. v. NLRB, 626 F.2d 674, 681 (1980), cert. denied, 449 U.S. 1125, 101 S. Ct. 941 (1981); see also Oshkosh Door, 1984 WL 47480 (N.L.R.B.G.C. 6/13/84).

PBS did not discriminatorily refuse to hire the former employees, and for lawful reasons the alleged discriminatees never constituted a majority of PBS' workforce at 80 Maiden Lane. As discussed in greater detail, supra, prior to the startup at 80 Maiden, PBS was not provided with any information from Witkoff or Clean-Rite or Local 32BJ or AM Property regarding the Clean-Rite workers at the building, or even their existence. Therefore, PBS had no choice but to bring in its own work crew to staff the building when AM Property gave PBS approximately two hours' notice to start cleaning 80 Maiden.

The record evidence shows that there were sixteen former employees. While eleven in total eventually filed written applications, only eight were sufficiently "interested" to attend interviews scheduled shortly after they applied. All eight received offers. Even if they had all accepted (which they did not) the former employees would not have constituted a majority of the PBS' workforce, which, despite only having one day employee, still stood at sixteen positions or greater due to PBS' extensive use of part-time employees.

When PBS did extend offers to the former employees who expressed "interest" in working for the Company, it found that they were not bonafide applicants, and not genuinely interested in employment with PBS. Only three of the former employees actually accepted offers and commenced work for PBS. At no time did those three employees ever constitute a majority of the PBS work force at 80 Maiden Lane, nor would they have ever constituted a majority even if PBS had not converted to a predominately part-time evening work force.

The Complaint does not allege that PBS representatives committed acts precluding the hiring of the former employees. It is precisely the absence of any such showing that has caused the General Counsel to create its convoluted “joint successor” theory. The General Counsel cannot point with any certainty as to whom PBS succeeded. PBS did not take over the business directly from Witkoff or Clean-Rite so it could not be their successor. If PBS is considered a successor to AM Property, PBS cannot be liable because AM Property never hired the former employees. Thus, regardless of who is the predecessor employer, PBS is not liable.

The entire successorship claim fails because there is no basis in fact or law. Accordingly, PBS never had an obligation to bargain with Local 32BJ, and did not violate §8(a)(5).

**B. PBS ENTERED THE BUILDING WITH NO KNOWLEDGE OF ANY PRIOR ALLEGED UNFAIR LABOR PRACTICE CHARGES AND IS THEREFORE NOT A GOLDEN STATE SUCCESSOR**

PBS has no successor liability under Golden State Bottling Co. v. NLRB, 414 U.S. 168, 94 S. Ct. 414 (1973), and therefore is not responsible for remedying any unfair labor practices that may have been allegedly committed by AM Property. While it is well-settled that a successor may be required to remedy the unfair labor practices committed by its predecessor, for liability to be imposed it must be shown that the successor obtained the business *with knowledge* of the unfair labor practices of the predecessor. Golden State Bottling Company, Inc., 414 U.S. at 181-85; Marlene Industries Corp. v. NLRB, 712 F.2d 1011, 1020-21 (6<sup>th</sup> Cir. 1983); Navajo Freight Lines, Inc., 254 NLRB 1272, 1281 (1981) (emphasis added).

PBS had no knowledge of any unfair labor practices by AM Property when PBS commenced cleaning services at 80 Maiden Lane. During negotiations for the cleaning contract, no representative of AM Property informed PBS as to facts amounting to any unfair labor practice or other litigation, or of any conduct that would lead to such litigation. This included the